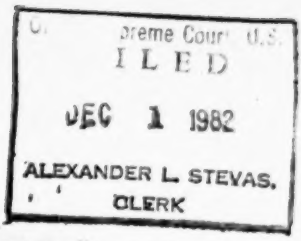
82-906



IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER, 1982 TERM

DONALD WAYNE HOWARD,

Petitioner,

vs.

THE STATE OF MINNESOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

Douglas W. Thomson
THOMSON & HAWKINS
Suite 1530
55 East Fifth Street
St. Paul, Minnesota 55101
(612) 227-0856

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court misapplied the rule in Edwards v. Arizona, in holding that Petitioner did not clearly assert his right to counsel and did not express a desire to deal with police only through counsel where Petitioner stated, during custodial interrogation, "I don't think I'd better say anymore - til I have an attorney." and the following day during reinterrogation asked, "Why don't I have an attorney here now?"

2. Whether the Minnesota Supreme Court erred in not applying Payton v. New York retroactively as required by United States v. Johnson, where Petitioner's case was pending direct appeal when Payton was decided and where Petitioner's warrantless arrest occurred at his home, at night, absent exigent circumstances.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction.....	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement.....	4
Reasons for Granting Certiorari.....	9
Conclusion	35
Appendices.....	A,B,C,D

CITATIONS

	Page(s)
CONSTITUTION:	
Amendment XIV	3
Amendment IV.....	3
Amendment V.....	3
Amendment VI.....	3
CASES:	
Blasingame v. Estelle, 604 F.2d 893 (5th Cir. 1979).....	13, 14
Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673 (1929).....	33
Clark v. Jagon, 676 F.2d 1099, 1111-13 (6th Cir. 1982).....	10, 11
Edwards v. Arizona, 451 U.S. 477 (1981).....	10,11,12,13 17,18,20,26, 27
Johnson v. Zerbst, 304 U.S. 458, 464 (1938).....	10, 25
Miranda v. Arizona, 384 U.S. 436 (1966).....	10,21,23,24
Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979).....	14
Payton v. New York, 445 U.S. 370 (1980).....	3,5,7,27,28, 29,30,31,32, 33,34
Silva v. Estelle, 672 F.2d 457, 459 (5th Cir. (1982).....	13
State v. Gant, 305 N.W.2d 790, 791 (Minn. 1981)...	28, 30

CASES (Con't): Page(s)

State v. Glade, 306 N.W.2d 141, 143 (Minn. 1981)... 31
State v. Hatcher, 322 N.W.2d 97, 210 (Minn. 1982)..... 31, 33
State v. Hinkle, 310 N.W.2d 97, 99 (Minn. 1981)..... 31
State v. Howard, No. 81-735 slip op. (Minnesota August, 31, 1982)..... 11, 12, 25
State v. Smith, 305 N.W.2d 798, 798-99 (Minn. 1981)..... 27, 28, 30
Stumes v. Solem, 671 F.2d 1150 (8th Cir. 1982).... 11, 18, 21
United States v. Johnson, ___ U.S. ___, 73 L.Ed.2d 202 (1982)..... 3,6,7,27,31, 32,33,34
Watts v. State, 305 N.W.2d 860, 862 (Minn. 1981)..... 27, 30

STATUTES:

Minn. Stat. §609.185(1)... 4
Minn. Stat. §609.175, Subd. 2(2)..... 4
Minn. Stat. §590.01 Subd. 3 4

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER, 1982 TERM

DONALD WAYNE HOWARD

Petitioner,

vs.

THE STATE OF MINNESOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Petitioner, Donald Wayne Howard, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Minnesota Supreme Court entered in this proceeding on August 31, 1982.

OPINION BELOW

The Opinion in the Minnesota Supreme Court, not yet reported, appears in

Appendix A.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on August 31, 1982. A timely motion for a rehearing was denied by the Minnesota Supreme Court on October 4, 1982 (Appendix B), and this petition was filed within sixty days of that date. Petitioner's conviction and sentence having become final, this Court's jurisdiction is invoked under 28 U.S.C. §1257.

QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court misapplied the rule in Edwards v. Arizona, in holding that Petitioner did not clearly assert his right to counsel and did not express a desire to deal with police only through counsel where Petitioner stated, during custodial interrogation, "I don't think I'd better say anymore - til I have an attorney." and the following day during reinterrogation asked, "Why don't I have

an attorney here now? "

2. Whether the Minnesota Supreme Court erred in not applying Payton v. New York retroactively as required by United States v. Johnson, where Petitioner's case was pending direct appeal when Payton was decided and where Petitioner's warrantless arrest occurred at his home, at night, absent exigent circumstances.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment XIV: "... nor shall any state deprive any person of life, liberty, or property, without due process of law,..."
>
> Amendment IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated,..."
>
> Amendment V: "No person ... shall be compelled in any criminal case to be a witness against himself..."
>
> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public

> trial, by an impartial jury ... to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT

Petitioner, Donald Wayne Howard, was indicted for murder in the first degree, in violation of Minn. Stat. §609.185(1) and conspiracy-to-commit-murder in violation of Minn. Stat. §609.175, Subd. 2(2). Petitioner was accused of hiring Bruce Webber to kill his wife, Shirleen Howard. Petitioner was tried by a jury on January 31, 1978, and was convicted on both counts.

Petitioner sought post-conviction relief from the trial court pursuant to Minn. Stat. §590.01 Subd. 3.[1/] Petitioner

---

1/ Minn. Stat. §590.01 Subd. 3 provides, "A person who has been convicted and sentenced for a crime committed before May 1, 1980, may institute a proceeding applying for relief under this chapter upon the ground that a significant change in substantive or procedural law has occurred which, in the interests of justice, should be applied retroactively, including re-sentencing under subsequent enacted law."

requested that his conviction be set aside or that he be granted a new trial. Petitioner based his request for post-conviction relief, in part, upon this Court's then-recent holding in Payton v. New York, 445 U.S. 370 (1980). Memorandum of Law in Support of Petition for Post-Conviction Relief, pp. 3-9. Petitioner's request for post-conviction relief was granted in part and denied in part on May 27, 1981. The trial court granted Petitioner's request to vacate his conviction of conspiracy-to commit-murder as a lesser included crime. Petitioner's Petition for Post-Conviction Relief based upon the Payton v. New York issue was denied. The trial court declined to apply Payton v. New York retroactively but noted that "[i]f Payton was so applied (retroactively), it would probably result in petitioner's conviction being vacated." (Memorandum attached to the Findings of

Fact, Conclusions of Law and Order, page 5). Petitioner appealed the order denying, in part, his request for post-conviction relief and made a motion to the Minnesota Supreme Court to reinstate his appeal on the merits. Petitioner's motion to reinstate his appeal was granted by the Minnesota Supreme Court on September 2, 1981. The Minnesota Supreme Court affirmed Petitioner's conviction upon review of the merits. See Appendix A.

Petitioner requested rehearing by the Minnesota Supreme Court and specifically asked that the Minnesota Court review the issue of whether Payton v. New York, 445 U.S. 573 (1980), applied retroactively pursuant to United States v. Johnson, ___ U.S. ___, 73 L.ed.2d 202 (1982), would result in the suppression of Petitioner's confession. See Appendix B, Petition for Rehearing. At the time of Petitioner's

request for rehearing, United States v. Johnson, supra, was in direct conflict with the Minnesota Court's holdings that Payton was not to be applied retroactively. Petitioner's request for rehearing was summarily denied. See Appendix C.

A brief summary of the facts relevant to the issues presented to the Court here are as follows:

On August 13, 1977, Petitioner returned home from shopping with his two daughters at approximately 9:15 p.m. and found his wife shot to death in the basement of their home (T. 145, 2629-2630).[2/] Shirleen Howard's death was caused by two bullet wounds to the head (T. 1451). When police arrived they searched Petitioner's home (O.T. 11, 12)[3/]

2/ T. refers to trial transcript.

3/ O.T. refers to Omnibus Hearing transcript.

Police officers investigating the death of Petitioner's wife made numerous trips to Petitioner's home and spoke with Petitioner on several occasions in the days following Shirleen Howard's death (O.T. 21, 22, 29, 31, 100, 101, 102, 165, 166). Petitioner was at all times cooperative and on several occasions, indicated his willingness to assist in the investigation (O.T. 32, 100, 101, 165, 176).

Petitioner was arrested at his home ten days after his wife was found shot to death in their home. On August 23, 1977, Raymond Riniker, wired with a recording device, spoke with Petitioner at his home at approximately 9:22 p.m. (T. 2449). At that time, Petitioner made the following statement to Riniker which was overheard by police officers:

> I come home and that's what I found. He was planning an

> accident. I was so goddamn mad-and it was gruesome.

(T. 2449-2453). Within minutes after Riniker left Petitioner's home, police officers arrived and placed Petitioner under arrest (T. 2455). The officers did not have an warrant for Petitioner's arrest. Petitioner was advised of his Miranda rights.

Upon arrival at the Winona Police Station, Ageny Rysavy of the Minnesota Bureau of Criminal Apprehension began interrogating Petitioner. Interrogation of Petitioner resumed the following day, August 24, 1977. See Appendix A for relevant portions of the interrogation.

REASONS FOR GRANTING CERTIORARI

A. The Illegal Interrogation

Two custodial interrogations of Petitioner, fairly construed, reveal six instances at which the police violated Petitioner's right to counsel and his right

to remain silent according to this Court's holdings in Miranda v. Arizona, 384 U.S. 436 (1966) and Edwards v. Arizona, 451 U.S. 477 (1981). The Minnesota Supreme Court misapplied Edwards in the present case and erred in holding Petitioner had made a "knowing and intelligent" waiver of his right to counsel as stated by this Court in Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Accord Edwards v. Arizona, 451 U.S. 477, 483 (1981).

In Edwards, this Court announced the following:

> [A]n accused, such as Edwards having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 485. This language has been interpreted as a per se rule. Clark v. Jagon, 676 F.2d 1099, 1111-13 (6th Cir.

1982); Stumes v. Solem, 671 F.2d 1150 (8th Cir. 1982). See also, Note, A Ban on Police-Initiated Interrogation Following an Accused's Invocation of His Right to Counsel, 23 Ariz. L.Rev. 1391-1403 (1981); Note, Edwards v. Arizona, The Burger Court Breathes New Life into Miranda, 69 Calif. L. Rev. 1734-1754 (1981); Note, Criminal Procedure-Self-Incrimination: Miranda Lives, 33 Fla. L. Rev. 788-798 (1981); Criminal Law, 95 Har. L. Rev. 112-132 (1981); Note, Fifth Amendment--Waiver of Previously Invoked Right to Counsel, 72 Crim. L. & Criminology, 1288-1306 (1981). But see the dissents in both Edwards v. Arizona, 451 U.S. 477 at 489-92, and State v. Howard, No. 81-735, slip op. at CS-1 (Minn. 1981).

In the present case, the Minnesota Supreme Court holds that the incriminating

August 24th statement was property admitted even though:

> The meeting and conversation was not initiated by Appellant, and therefore, was in violation of Edwards if Appellant had "expressed his desire to deal with the police only through counsel" the night before. Edwards, at 484.
>
> Respondent contends that Appellant did not clearly assert his right to counsel nor did he express a desire to deal with police only through counsel. We agree.

State v. Howard, No. 81-735, slip op. at 10 (Minn. 1982).

Petitioner agrees with the Minnesota Supreme Court that the police initiated the meeting and interrogation on August 24. Petitioner disagrees with the Minnesota Supreme Court that he failed to make a clear assertion of his desire to deal with the police only through counsel the night before. The Minnesota Supreme Court found that four statements made by Petitioner

during the August 23 interrogation construed "as a whole" did not constitute a request for counsel. The critical passage of this interrogation is reprinted in the Minnesota Supreme Court's opinion in Appendix A.

Petitioner's first of four consecutive statements is, "I don't think I'd better say anymore--til I have an attorney." Once the Petitioner made this clear assertion of his desire to deal with the police only through counsel, then further interrogation was in violation of Edwards. The Minnesota Supreme Court should not have considered the remainder of the interrogation in determining whether Petitoner's assertion was clear. Only if Petitioner's initial assertion of his right to counsel was equivocal or unclear can the interrogator ask further questions to clarify an accused's assertion. See Silva v. Estelle, 672 F.2d 457, 459 (5th Cir. 1982); Blasingame v.

Estelle, 604 F.2d 893 (5th Cir. 1979); Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) (en banc). Petitioner's assertion was not equivocal or unclear within the meaning of these cases.

The interrogator's next question was, "Do you want to end our conversation?" Petitioner responded, "I'll talk as long as you want to, but--." Petitioner was about to add a qualification to his second statement when the interrogator cut him off. Petitioner might have meant to say, "..., but not until I have counsel," or "..., but not about the murder or anything that can be used against me."

The interrogator's next statement is, "Well, you just said you didn't want to say anymore til you had an attorney." Petitioner's response is, "Well, I guess I won't make any conversation." Petitioner's response reasserted his right to remain

silent and implicitly ratified his request for counsel. For the third time, in violation of Edwards, the interrogator continued to question Petitioner after Petitioner requested an end to the interrogation.

The interrogator's next question was, "Do you recall when we first started and I advised you of your rights, the last thing I said to you-we could stop talking at any time during our conversation if you'd just say so. Is this that time?" Petitioner's response is, "I guess so, yeah." Petitioner reasserts his desire to terminate the interrogation but the interrogator continued to question Petitioner, in violation of Edwards, for two more pages in the original transcript. Petitioner's fourth response cannot be interpreted as, "I'm not sure, yeah." Rather, Petitioner's fourth response should be read, "In my

best judgment, yeah, I desire to deal with the police only through counsel." If Petitioner was equivocal, then he would not have added the word "yeah."

The interrogator then suggests that Petitioner consider rescinding the assertion of his rights, "You think it is. You want to think on it. All right, Don, not just so that I have the last word or anything - do you feel that I've lied to you at any time during our conversation."

The record shows no evidence that Petitioner responded affirmatively or negatively to the interrogator's suggestion, "to think on it" but interrogation continued. If the interrogator honestly believed that Petitioner wished to reconsider whether he wanted to terminate the interrogation, then the interrogator should not have continued to ask for incriminating information without giving Petitioner time to think. In

any case of interrogation, the interrogator could ask an accused to think about talking to the police at a later time. The accused is likely to say "sure" to such a seemingly innocuous request. An interrogator should not be able to eviscerate the protection of the Edwards rule so easily.

The Minnesota Supreme Court construed the entire passage as a whole and held that Petitioner had not clearly asserted his desire to deal with the police only through counsel. Construing the passage as a whole conflicts with Edwards, because once Petitioner clearly asserts his desire to deal with the police only through counsel, then further questioning is irrelevant. An interrogator should not have an opportunity to subtly coerce the accused into retracting a clear assertion of his rights. The Edwards rule was specifically designed to prevent subtle coercion. The Minnesota Supreme

Court, therefore, misapplied Edwards in the present case.

Petitioner is not an attorney and would not know that the magic words are, "I desire to deal with the police only through counsel." Petitioner's initial assertion of his right to counsel was clear and unequivocal. See Stumes v. Solem, 671 F.2d 1150, at 1153 (8th Cir. 1982) (The accused's assertion that "I would rather not talk about it any more at this time until I talk to my attorney and after that I'll give you a full statement in regard to her death." The accused's statement is a clear assertion under the Edwards rule). Furthermore, Petitioner's statements, even if construed as a whole, evidence a clear and unequivocal assertion of his desire to deal with the police only through counsel.

After the interrogation finally ended,

Petitioner was taken to a cell for the night. Between the August 23 and August 24 interrogations, Petitioner initiated two unrecorded comments to the police. First, sometime during the night, officers delivered a copy of Petitioner's statement to him in his cell. During this delivery, the Petitioner said, "I must be really sick, huh?" (T. 1996; O.T. 129). The officers did not interrogate Petitioner at this time. Second, about 9:00 in the morning, officers again approached Petitioner's cell. This time the officers intended to ask Petitioner to give a statement. When the officers approached, Petitioner awoke and apparently the first words spoken were his. He inquired about who was caring for his daughters. Petitioner was told that his daughters were fine and then he was asked if he would give a statement. Petitioner agreed. This police-

initiated interrogation is a violation of Petitioner's right to counsel and to remain silent.

The Minnesota Supreme Court holds that the August 24 "meeting and conversation" was police-initiated. The two comments initiated by Petitioner, therefore, were insufficient to invite further police interrogation under Edwards. With these two comments, however, this Court has an excellent opportunity to clarify the first two of the following three issues concerning the Edwards rule:

> [I]t is not clear from the [Edwards] decision: 1) Whether police may initiate interrogation of an accused any time after he initiates further conversation or whether the two events must be proximate in time; 2) whether the exchange in which an accused initiates conversation must be related to the subject matter of the crime for which he had been arrested in order for police to be free to question him; 3) whether police, in a Mosely-type situation, may question

> an accused, who has requested counsel, about a crime that is totally unrelated to the original offense for which he had been arrested.

Note, Edwards v. Arizona, The Burger Court Breathes New Life into Miranda, 69 Calif. L. Rev. 1734, at 1403 (1981). Cf. Stumes v. Solem, 671 F.2d 1150 (8th Cir. 1982).

The police began the August 24 interrogation by reading to Petitioner his Miranda rights. A tape recording was running. Four officers, including the interrogating agent from the previous night, were expectantly awaiting his statement, but Petitioner had a confused understanding of his rights. Petitioner asked, "Why don't I have an attorney here now." The interrogating officers response was, "Why don't you? Ah, would you rather have one present during our questioning?" Petitioner responded, "Well, ah, no, I guess not,..." (Transcript of August 24 statement at 1).

The interrogating officer's response, "Why don't you ..." implies to Petitioner that it was Petitioner's own fault if an attorney was not present. Under the circumstances, Petitioner's desire to insist on an attorney may have been overcome. This is the fifth instance in which the police violated Petitioner's right to counsel.

Petitioner may have wanted an attorney present for a number of reasons. For example, he may have wanted representation while making his statement or he may have wanted to consult an attorney before finally deciding to give any statement at all. The interrogation reveals that Petitioner still had reasonable doubts that he was responsible for the murder at all. (Transcript of August 24th statement at 12).

When Petitioner agreed to give his statement, he had not yet made any attempt to contact an attorney, nor had the police

explicitly offered him the opportunity to use a phone to contact one. Petitioner's failure to obtain an attorney at this time is quite understandable. Petitioner had been arrested long after the close of business hours the night before and he was sleeping in the morning until the police awakened him about 9:00 a.m.

Although Petitioner had employed a business lawyer several times, Petitioner does not appear to be sophisticated about the law. On the contrary, Petitioner seems to have misunderstood his Miranda rights. Petitioner had clearly asserted his desire to deal with the police only through counsel the previous night. Petitioner may have thought, therefore, that the state would provide him with an attorney upon any reinterrogation. Alternatively, Petitioner may have thought he was an indigent. Petitioner explicitly

indicates near the end of the August 24 interrogation that he was financially stretched thin with debt. (Transcript of August 24 statement at 13).

In the middle of the August 24 interrogation, Petitioner's confusion about his Miranda rights is even more apparent. Twenty-eight minutes into the interrogation, the recorder was shut off at Petitioner's request. Petitioner asked, "When can I have an attorney?" (O.T. 60). Petitioner inquired as to a court appointed attorney. Rysavy said, "They probably shouldn't discuss that," since it was a matter for the court to determine (O.T. Prosecution's Exh. 5, p. 11; O.T. 58-63). Rysavy's response and the repeated request for a statement by the police on August 23 and 24 implied that the police were free to keep asking Petitioner to give a statement until some time in the future when a court might appoint counsel. Petitioner's desire to wait for

counsel, therefore, may have been discouraged. Petitioner agreed to continute the interrogation, but his decision to continue the interrogation was not a "knowing and intelligent" wavier of his right to counsel as announced in Zerbst. The police therefore, violated Petitioner's right to counsel for the sixth time in two days.

The statement Petitioner subsequently completed was an essential element in his eventual conviction. The statement lead to the arrest of the actual killer and linked Petitioner to the murderer. Without this incriminating statement and its fruits, proof of the Petitioner's link to the actual murder is not nearly so strong. Admitting the statement into evidence, therefore, was not harmless error. See Justice Peterson's opinion in State v. Howard, No. 81-735, slip op. at CS-1-4 (Minn. 1982).

This Court should grant certiorari in

this case, because in our system of jurisprudence, individuals in like circumstances should be treated equally. Petitioner was not treated equally as defendants in other cases under the Edwards rule. Also, this case presents this Court with an excellent opportunity to clarify and refine Edwards.

If this Court does not grant certiorari in this case, the Minnesota precedent will allow the police great freedom to engage in abusive and subtly manipulative coercion of an accused to initiate interrogation after the accused has clearly asserted his right to deal with the police only through counsel. Absent blanket prohibitions, such as in Edwards, police abuse of the Miranda rights is likely.

> Absent such blanket prohibitions, police are likely to legitimize any effective tactic not expressly banned, and to 'push to the limit'

> any constitutional restraint on their actions.

Note, Edwards v. Arizona, The Burger Court Breathes New Life into Miranda, 69 Calif. L. Rev. 1734, at 1744 (1981).

Edwards is a good workable rule that clarifies and reaffirms Miranda. A failure to grant certiorari in this case would begin a new era of confusion in Minnesota and perhaps the country on the meaning of Miranda.

B. The Illegal Arrest

On January 21, 1982, this Court applied its ruling in Payton v. New York, 445 U.S. 573 (1980) retroactively to convictions not yet final. United States v. Johnson, ___ U.S. ____, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982). This Court's decision decision changed the case law of Minnesota which did not apply Payton retroactively. Watts v. State, 305 N.W.2d 860, 862 (Minn. 1981); State v. Smith, 305 N.W.2d 798, 798-99

(Minn. 1981); and State v. Gant, 305 N.W.2d 790, 791 (Minn. 1981).

The Minnesota Supreme Court erred in not addressing the retroactive application of Payton in Petitioner's case. At the time Payton was decided, Petitioner's conviction was not yet final. Payton v. New York, was decided on April 15, 1980. Petitioner's original appeal to the Minnesota Supreme Court was dismissed by that Court on August 18, 1980, four months after Payton was decided. Petitioner requested that his appeal on the merits be reinstated and on September 2, 1981, the court ordered that Petitioner's appeal be reinstated. See Appendix D.

Even if it could be argued that Petitioner's conviction became final when the Minnesota Supreme Court dismissed his original appeal on August 18, 1980, that "final" conviction was un-finalized when

the Minnesota Court reinstated Petitioner's original appeal. Petitioner's original appeal was pending on April 15, 1980, when Payton was decided.

In Payton, this Court held the Fourth Amendment prohibited police from making a warrantless and nonconsenual entry into a suspect's home to make a routine felony arrest absent exigent circumstances. Because of the applicability of Payton to Petitioner's warrantless arrest, the ruling was presented to the trial court as a ground for granting his petition for post-conviction relief on February 19, 1981.

In Petitioner's memorandum in support of his petition for post-conviction relief, he argued that under the holding of Payton v. New York, supra, his warrantless arrest inside his home was patently illegal; that the statements derived from his illegal arrest were tained and should have been

suppressed. Petitioner also argued there were no exigent circumstances at the time he was arrested. He had been in the Winona area since the death of his wife. There was no indication he was attempting to flee the jurisdiction, avoid arrest, or destroy evidence.

On May 27, 1981, the trial court denied that portion of Petitioner's petition for post-conviction relief based upon the Payton v. New York issue. In the Memorandum of Law attached to the Order denying post-conviction relief, the applicability of Payton v. New York was discussed. The Court declined to apply Payton v. New York retroactively in accordance with the Minnesota Supreme Court's decisions of State v. Gant, 305 N.W.2d 790, 791 (Minn. 1981); Watts v. State, 305 N.W.2d 860, 862 (Minn. 1981); and State v. Smith, 305 N.W.2d 798, 798-99 (1981), but noted that "[i]f Payton

was so applied (retroactively), it would probably result in petitioner's conviction being vacated." (Memorandum attached to the Findings of Fact, Conclusions of Law and Order, page 5).

Petitioner did not raise the applicability of Payton v. New York, supra, to his case on his reinstated appeal because of that court's firm position that Payton not be applied retroactively. See, State v. Hinkle, 310 N.W.2d 97, 99 (Minn. 1981). The Minnesota Supreme Court has since overruled this entire line of cases to the extent they are inconsistent with Johnson v. United States, ___ U.S. ___, 73 L.Ed.2d 202 (1982). State v. Hatcher, 322 N.W.2d 210, at 216 (Minn. 1982). Before the Minnesota Supreme Court handed down its decision on Petitioner's appeal, Petitioner again raised the Payton issue in a Motion and Memorandum for Leave to Include a

Supplemental Brief. Petitioner's motion was precipitated by this Court's decision in United States v. Johnson, ___U.S.___, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982). The Minnesota Supreme Court did not rule on Petitioner's motion to file a supplemental brief and the court's decision did not address the Payton issue. See Appendix A. Petitioner again raised the Payton issue in his Petition for Rehearing. This Court's decision in United States v. Johnson, supra, applying Payton retroactively added a significant issue to Petitioner's appeal. In Johnson, the defendant was arrested at his home, without a warrant, and interrogated after being advised of his consitutional rights. He confessed. The confession was suppressed. Here, Petitioner was arrested, without a warrant, at his home, was advised of his rights, and later confessed. His confession

should be suppressed applying the Payton and Johnson analysis.

Given the trial court's statement that retroactive application of Payton v. New York, supra, would "probably result in [Petitioner's] conviction being vacated," this Court should grant certiorari on the retroactive applicability of Payton v. New York to Petitioner's arrest and resulting confession.

This Court may grant certiorari because the so-called "surprise" case is involved. See Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673, (1929). See also Stern and Gressman, Supreme Court Practice at 221-22, 224 (Fifth Ed. 1978). Before Johnson, Petitioner could not reasonably have been expected to anticipate a Minnesota case holding Payton must be applied retroactively. See State v. Hatcher, 322 N.W.2d 210, 216 (Minn. 1982).

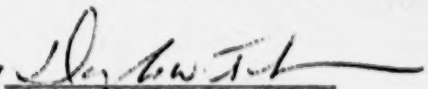
The Minnesota Supreme Court denied the petition for rehearing and avoided the Payton issue in Petitioner's case. The United States Supreme Court should also grant certiorari so that the Petitioner will be treated the same under Payton and Johnson as similarly situated Defendants. See Johnson, at 2594.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

THOMSON & HAWKINS

By 

DOUGLAS W. THOMSON
Suite 1530
55 East Fifth Street
St. Paul, Minnesota
55101
(612) 227-0856

Counsel for Petitioner